

July 17, 2014

The Honorable Martha Coakley, Attorney General
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108

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OFFICE OF THE ATTORNEY GENERAL
EXECUTIVE BUREAU

Re: Comments on the Proposed Final Judgment in Massachusetts v. Partners Healthcare System, Inc., South Shore Health and Educational Corp., and Hallmark Health Corp., Civ. No. 14-2033 (BLS).

Dear Attorney General Coakley:

I offer these comments in this proceeding as a citizen of the Commonwealth. For the benefit of the Court, I first include a short summary of my professional background with regard to matters of market power in general and the state's health care system in specific. I then turn to the substance of my arguments.

Following receipt of degrees from MIT in 1974, including a bachelor of science degree in economics, I have had almost forty years of experience in service in public agencies and non-profit institutions. In many of these positions, I have had to deal with and rule on matters related to market power and make determinations about how to best serve the public interest. For example, when I was Chairman of the Department of Public Utilities (1983-1987), I issued rulings concerning the manner in which competition should be introduced and encouraged in the electric power industry, the natural gas industry, the telecommunications industry, and the transportation common carrier industry. Before holding that position, I participated as an expert witness (from 1981 to 1983) before several public utility commissions across America and offered advice to those bodies on how to deal with the extraordinary market and pricing power of the Bell Operating Companies—before those companies were divested from AT&T as a result of a Consent Decree before the US District Court for the District of Columbia in *United States v. AT&T*. Following my service at the MA DPU, I served as the arbitrator under the Telecommunications Act of 1996 to determine the pricing regime and other aspects of introducing competition into the local exchange market in Massachusetts. I have published numerous articles on the issues surrounding regulation of public utilities and telecommunications companies, and particularly on the transition from regulated markets to competitive markets.

Since 2006, I have served as a member of the Board of Directors of ISO-New England, the non-profit corporation charged with overseeing and regulating the wholesale electric power market in the region. Among other responsibilities, the Board is charged with ensuring that market participants do not engage in abuse of market power in the purchase and sale of electric power.

My experience in the health care marketplace of Massachusetts began when I was Executive Dean for Administration of Harvard Medical School (1998-2002). This was followed by service as Chief Executive officer of Beth Israel Deaconess Medical Center (2002-2011). In the latter capacity, I had the opportunity to view the dominant provider group, Partners Healthcare System (PHS), exercise

substantial and growing market power. Since leaving BIDMC, I have remained active in the health care field and have been invited by numerous audiences domestically and abroad to speak on health care matters. I have continued to observe and write about this field and have documented the ongoing market power of PHS and the deleterious effect the exercise of such market power has on the public interest.

Turning to the instant case, the Attorney General offers the Court her interpretation of the appropriate standard of review for the proposed final judgment. I excerpt a section of her filing:

Judicial review of consent judgments is primarily focused on legality and considerations of procedural fairness. Courts properly review consent judgments to ensure several core requirements are met. First, a court should ensure that they are not ordering conduct that contravenes the law. Second, a court should ensure that any terms that the court might one day have to enforce are reasonably clear. Third, a court should ensure that the consent judgment relates to a genuine dispute by virtue of having some reasonable relationship to the claims asserted.

As in any case in which the Attorney General seeks injunctive relief, the court must consider the public interest. But the public interest inquiry is a narrow one: the inquiry is not "what the district court believes might have been the optimal settlement" the court's duty is to determine "whether the settlement is within the reaches of the public interest." [Cites omitted.]

It is not my place, nor do I have legal expertise, to suggest a different standard of review. Instead, I respectfully offer my opinion and advice to the Court as to how it might interpret that standard of review—as a general matter and with specific regard to the case at hand. I believe that the Attorney General has the burden of demonstrating that such a standard has been met. In summary, it is my recommendation that the Court rule that she has not done so. If the Court agrees, the remedies—as I understand them—are to deny the motion altogether or to return it to the parties with instructions to renegotiate an improved settlement.

In applying the Attorney General's advice that the proposed settlement must be within "the reaches of the public interest," we must demand that the result achieved is no worse than the status quo and preferably better than the status quo. In that regard, we have the benefit of the Attorney General's own work products over the years. She has concluded that the disparity in rates charged by PHS is not the result of a higher level of quality offered by that organization, but that it is a result solely of the exercise of market power. She has also concluded that such price disparities are, in themselves, a source of ever-rising health care costs for the citizens of Massachusetts. In other words, the mere existence of those disparities makes things worse for the consumers of the Commonwealth.

At a minimum, then, we would hope that a settlement with PHS would act firmly and decisively to reduce those disparities—and quickly enough to make a difference. It is not enough to have the hope that the proposed settlement would achieve this result: The end must be measurable and enforceable.

At heart, instead, the proposed settlement offers a wish and a prayer towards this result. Yes, the rates for PHS would be limited to the rate of inflation. Theoretically, other hospitals and physician groups might then "catch up" if their own rate increases exceeded those of PHS. However, other providers have not been able to receive rate increases above that of PHS. There is nothing in the settlement that

empowers them to do so, and, indeed, the settlement cannot force insurers to do what they have never done before.

Further, even if providers could get such preferential treatment, the base upon which rate increases would be granted compared to the already substantially higher rates garnered by PHS forecloses the possibility of narrowing the gap by any appreciable amount within any reasonable time frame.

By allowing the disparity of rates to continue, the Attorney General offers a result that is worse than the status quo. That disparity permits PHS to accumulate additional revenues disproportionate to the value it provides to society, extracting ever-increasing funds from the public, and giving it the resources to engage in further expansion, magnifying its market power. The Attorney General ignores her own conclusion from her past analyses, turning a blind eye to the fact that it cannot be in the public interest to permit a dominant provider to become still more dominant.

If the Court concludes that the public interest standard must result in a reasonable probability that the result will be *better* than the status quo, the proposed settlement obviously fails for the same reasons. But the problem is compounded in that the proposed settlement gives explicit permission for PHS to acquire new hospitals and new physicians, expanding its geographic reach and its dominance.

As others will point out, conduct remedies of the sort contained in the proposed settlement are clearly inferior to blocking an anticompetitive merger. Such conduct measures are typically unsuccessful, in part because antitrust enforcers and courts lack the expertise and institutional capability to adequately regulate firms with market power. In part, too, there are inevitable disputes before the courts as to whether the merger proponent has complied with such measures. It is for these reasons that federal enforcement agencies and courts have rejected these types of conduct remedies in hospital mergers and other cases.

When faced with similar issues in this or other sectors, the federal government has ordered divestiture of key productive assets, or it has declined to permit mergers. I recognize that the Court may not have the authority to order such a result in this case, but it certainly does have the authority to conclude that the proposals and conduct remedies included in this proposed settlement do not meet the public interest. I respectfully suggest that Court reach such a conclusion.

Sincerely,



Paul F. Levy

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